

THE PRINCIPLE OF COMPLEMENTARITY:

**A FAÇADE FOR STATE SOVEREIGNTY OF REINFORCER IN
THE FIGHT AGAINST INTERNATIONAL CRIMES?**

BRENDA GRACE OKOTT

Candidate number: 9002

Submission deadline: 01.12. 2014

Number of words: 17419



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ACKNOWLEDGEMENTS

This journey would not have been possible without the support of my family,

I dedicate this study to my beloved Children, Karen, Kelly, Kisha and Kayla. And beloved husband Charles MacWange, you have been my daily strength all through.

May your lives and future be blessed, may your history be something you cherish, and may those who come in to your lives treat you with tenderness, kindness, love and respect. May you always be loved and blessed.

Your presence around me all the time, made me hope that you will value education at all times. I also hope that this study will be an inspiration to my family at large.

To my friends Wale Adjibade and Florence Obua, thank you for encouraging me in all of my pursuits and inspiring me to follow my dreams. I owe a debt of gratitude to Florence Obua for her time and careful attention to detail.

I am especially grateful to my Husband Charles MacWange, who supported me emotionally and financially. I always knew that you believed in me and wanted the best for me.

I must thank all the PIL professors and Bente, Morten. Each of you has given of your time, energy, and expertise and I am richer for it: for your unwavering assistance and patience throughout my Masters studies.

I would like to give special thanks to Professor Nobuo Hayashi I thank him for his untiring support and guidance at the beginning of my journey.

An award awaits all the above mentioned in the kingdom of God.

B.G.O

LIST OF ACRONYMS

ASP	Assembly of State Parties
AU	African Union
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
EU	European Union
ICC	International Criminal Court
ICD	International Crimes Division
ICJ	International Court of Justice
ILC	International Law Commission
LRA	Lord's Resistance Army
ND	Not Dated
OTP	Office of the Prosecutor
PGA	Parliamentarians for Global Action
PTC	Pre-Trial Chamber
UN GA	United Nations General Assembly
UN SC	United Nation Security Council
UPC	Union des Patriotes Congolais

Abstract

Atrocious crimes have been committed in the course of several wars that plagued the course of history. Consequently, a crusade over several centuries culminated in a treaty – the Rome Statute which for the first time in human history, created the ICC, an independent and permanent Court to investigate and prosecute heinous crimes committed in the course of wars and violent conflicts but in certain specific circumstances. Crucially, the Rome Statute explicitly repudiates all forms of exemption from criminal responsibility. A cornerstone for the operation of the Court is the principles of complementarity which reiterates the primacy of national judicial processes. Only when a state is either unwilling or unable genuinely to investigate and prosecute a case may the Court's jurisdiction be activated.

A decade after the Court became operational, it has faced pressure and accusations of among others, whittling away state sovereignty and undertaking selective prosecution especially targeting Africans. In light of these serious allegations from erstwhile supporters turned critics of the Court, the study, using largely the grounded theory methodology premised on a qualitative research paradigm, examined the veracity of and sought the theoretical foundations of these accusations. In addition, the study critically discussed the twin notion of unwillingness and inability which underpins the principle of complementarity.

One of the findings of the study was that despite strong claims from political elites from political elites from some state parties, the assertion that the Court severely undermines state sovereignty and targeting the African continent is untenable. Accordingly, a theory of self-interest emerged as a plausible explanation for criticisms levelled against the Court. A critical examination of the Court's application of the unwillingness and inability test showed contrary to the initial fear that absence of precise definitions would hamper the jurisdiction of the Court, it on the contrary permit progressive flexibility.

A conclusion from the study was that, although not etched as a universally accepted customary law, sovereignty and immunity cannot be an excuse for culpability for commission of crimes that causes outrage against humanity. Despite challenges that it faces, the ICC offers the best prospect of being an effective deterrence and accountability for unimaginable atrocities that hitherto have deeply shocked humanity's conscience and threatened world peace and security. It is for these reasons the study reiterated calls for unflinching support for the Court and its protection from political pressures and interferences in performance of its noble mandate.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

A long held aspiration of the international community was the creation of a permanent court to prosecute cases of 'unimaginable atrocities that deeply shock the conscience of humanity and threaten the peace, security and well-being of the world'¹.

Although the quest for an international mechanism to tackle dates far back in time, it was in the nineteenth century as wars ravaged Europe that the need for such institutional became urgent, the calls for it became more pronounced and initiatives in this regard began to take shape. Subsequent years witnessed a number of conventions and ad hoc tribunals prosecuting war criminals from the sides that have lost in major wars.

However, although the ad hoc tribunals of Nuremberg and Tokyo were steps towards the creation of a court to enforce accountability for atrocities committed in the course of war, they were neither permanent nor viewed as impartial. Nsereko (2013) highlighted the school of thought which viewed these ad hoc tribunals as the victors' justice – a means through which states that have emerged victorious imposed their justice against the “vanquished” in a conflict. The criticism therefore highlighted the need for creation of a permanent and independent court to tackle the challenge of war crimes.

The quest for a permanent and independent eventually came to fruition when the Rome Statute of the ICC entered into force on 1, July 2002. The Court has jurisdiction over four crimes: The crimes of genocide, crimes against humanity, war crimes and crimes of aggression². After a decade of operation responding to crimes committed in crisis situation initially mostly for Africa, the Court became increasingly criticised and pressured from some of the state parties especially from Africa who appeared rattled by the scope of investigations and prosecution before the Court.

¹ Preamble to the Rome Statute

² Article 5, Rome Statute

Timeline of the Establishment of the ICC

1872	Gustav Moynier, a founder member of ICRC proposes a permanent court to try crimes of the Franco-Persian war
1899, 1907	The Hague conventions on laws of armed conflict are adopted
1919	The Versailles Peace Treaty made the first attempt to establish individual criminal responsibility to try World War 1 criminals
1945	The International Military Tribunal is established to try Nazi German leaders on war crimes charges
1946	The Tokyo (International Military) Tribunal is established to prosecute war crimes involving Japanese defendants
1946	UN General Assembly reaffirms the Principles of the Nuremberg trial
1948	UN GA adopts the Convention on the Prevention and Punishment of the crime of genocide
1949	Four Geneva conventions adopted to strengthen protection of civilians and prisoners of war during wartime
1950	The International Law Commission develops the seven "Nuremberg Principles" setting standards of international law including personal responsibility of politicians for their actions
1949-1954	ILC drafts a statute for an ICC. However, the effort is stymied by opposition by both sides of the cold war and consequently abandoned
1974	UNGA agrees on a definition of aggression. However, the definition was adopted by vote and not universally recognised
1977	Two additional Protocols to the 1949 Geneva Conventions are adopted
1989	Trinidad and Tobago resurrect a pre-existing proposal for establishment of an international court. UN GA instructs ILC to resume work it had started and prepare a draft statute
1993	UN SC establishes an ad hoc tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY)
1994	UN SC establishes a second ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR)
1994	ILC presents to the UN GA a draft statute for an ICC. The UN GA establishes an ad hoc committee to review the draft
1998	An international conference discusses and votes in favour of the Rome Statute
1999	Senegal becomes the first state to ratify the Rome Statute
2000	The deadline for signature of the Rome Statute expires with 139 states having signed
1, April 2002	The Rome Statute is ratified by 60 states, the number required for its entry into force
1, July 2002	The Rome Statute enters into force, binding on all parties that have ratified or acceded to the Statute

Adopted from Briefing Paper: The Evolution of International Criminal Law from Nuremberg to the Hague³

³ ICC Seminar for Fostering Cooperation, 11-15 March 2013, Nuremberg, Germany

1.2 Background to the Study

Of the many aspects in and issues arising from the Rome Statute that established the ICC, complementary, the principle restates the primacy of national courts in investigating and prosecuting international crimes, seems to have, by far attracted the most attention and intense debate. The controversies surrounding the establishment of the ICC have been fuelled by glaring anomalies in certain provisions of the Rome Statute. For instance, the formulation of Article 17 of the Rome Statute was not comprehensive (Cryer 147), a fact that has provided a fodder for States that are intolerant to International Crimes to feign eagerness to prosecute as a façade to protect alleged perpetrators of International Crimes from genuine prosecution by the ICC.

The thesis examined the radical change in the attitude of some state parties that had initially voluntarily referred their cases to the ICC on merit. In addition, an attempt is made to establish the nexus between over eagerness to prosecute the cases domestically, whether such attempts to institute local investigations and prosecutions with a view to subverting prosecution of the cases before the Court falls within the notions of ‘unwillingness’ and ‘inability’ genuinely to prosecute.

As of 25, January 2013, there were 8 situations before the Court all of which were in Africa. These included one case in connection with Northern Uganda, six cases in connection with the Democratic Republic of Congo (DRC), five cases in connection with Dafur, two cases each in connection with Kenya and Côte d’Ivoire and one case each in connection with the Central African Republic (CAR) and Libya, and commenced investigation in the situation in Mali⁴. Four of these countries are state parties to the Rome Statute. The Central African Republic, Uganda, and the Democratic Republic of Congo referred the situations in their countries to the Prosecutor.

The changing position of Ugandan government with regard to the prosecution of fighters of the Lord’s Resistance Army at the ICC has engendered mixed debates (Mendes, 137). More importantly, the justification provided by Ugandan government for a sudden change in stance reeks of over eagerness to prosecute the LRA fighters.

⁴ On 24 November 2014, OTP announced the opening of a second investigation in the CAR bringing the total number of situations to 9. see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

The government of Uganda, which is a state party to the ICC, referred the “the situation concerning the Lord’s Resistance Army” to the ICC in 2003 (Arieff, Rhoda and Browne 20). Consequently, the ICC unsealed arrest warrants for the leader of the LRA, Joseph Kony and LRA commanders Okot Odhiambo, Vincent Otti, Raska Lukwiya and Dominic Ongwen⁵. According to the Prosecutor, the LRA was guilty of instituting a “pattern of brutalization of civilians” including forced abduction, murder, mutilation and sexual enslavement, which constituted crimes against humanity and war crimes (ibid). However, Uganda’s position regarding the prosecution of the LRA fighters seems to have changed after February 2008, when the rebels and government representatives signed a landmark cessation of hostilities agreements, including a permanent cease-fire (Mendes 162). By 2013, Uganda’s stance towards ICC had radically changed with President Museveni turning into an avid critic of the institution and unsuccessfully spearheading an attempt to garner the support and rally African state parties for a mass withdrawal from the ICC.

The Ugandan government has belatedly offered a combination of amnesty and domestic prosecution for lower and mid-ranking LRA fighters and is reportedly willing to prosecute LRA leaders in domestic courts if the rebels accept a peace agreement (Mendes 162). This course of action may entail challenging the LRA’s cases admissibility before the ICC under the principle of complementarity. Such a move is tantamount to challenging the ICC’s authority to make a decision on admissibility. As expected, the Prosecutor has stated that he will contest any move to drop the LRA prosecutions (Arieff, Rhoda and Browne 21).

The states appear to have devised strategies to scuttle prosecution of cases before the Court on the by over eagerness, premised on the principle of complementarity, to undertake national investigation and prosecution of cases with the view of exonerating the suspects.

1.3 Statement of the Problem

The Rome Statute of the ICC came into force on 1 July 2002. The treaty, which formed the basis for establishing the first permanent criminal court in the world⁶, is considered the most

⁵ See *supra*, Chapter III. 5 and 7.2

⁶ Interesting debates have emerged on the effect of ICC establishment on States ability to exercise universal jurisdiction. While some authors such as Stigen and Ambrose focus on the negative impact of such a move others such as Cassese and Broomhall dwell on the positive effects of the Court’s establishment and the ramifications it has on the exercise of universal jurisdiction. See J. Stigen, *The Relationship between the ICC and National Jurisdictions. The Principle of Complementarity*, *supra* n. 55, 26; and B. Broomhall, *International*

vital international treaty since the United Nations Charter was adopted in 1945. The entire ICC system functions primarily on the principle of complementarity as provided for in Article 17 of the Rome Statute. Although complementarity reaffirms the primary right of States and sovereignty in exercising criminal jurisdiction, the Court has paradoxically be accused of whittling state sovereignty. Although the principle of complementarity is variously enshrined in Articles 1, 15, 17, 18 and 19, is specifically grounded in different conditions of implementations, a succinct understanding and appreciation of the said conditions of implementation is a daunting task. For instance, ‘unwillingness’ and ‘inability’ genuinely to prosecute are open terminologies that are not precisely defined. The prosecution authority is thus, it appears, left with wide discretionary powers when deciding both the content and framework within which such terms are applied. Consequently, the conditions of application of such terminologies may give room for dubious selection of cases, which are to be brought before the ICC. Moreover, a review of the Prosecutor’s discretionary powers by the Pre-Trial Chamber, necessarily, allows the exercise of another form of discretionary power. In the event the Security Council decides to initiate proceedings, which eventually lead to indictments, such process will have entrenched the principle of complementarity. However, such divergent forms of appreciation of the principle of complementarity have led to fragmentation of its meaning. The ambiguity presented by a failure to succinctly define the concepts of “unwillingness” and “inability” in the Rome Statute, on the face of it presents both structural and substantive anomalies, and serve to clearly demonstrate that the court has no limited jurisdiction. These challenges are further compounded by the fact that in the course of domesticating the Rome Statute, some countries did so verbatim, other restricted the while others broadened the definition of the Rome Statute crimes resulting in conflicting terminologies in the definitions espoused by different jurisdictions against the original provisions of the Rome Statute.

1.4 Thesis Statement

If national justice systems and the ICC are "two sides of the same coin" as the EU (2013, p.9) asserts, what underscores the criticism of the Court and what are the underlying causes of the apparent tension in some instances between national systems and the Court within despite the

Justice and the ICC: Between Sovereignty and the Rule of Law, *supra* n. 21, 112-118; A. Cassese, *International Criminal Law*, *supra* n. 174, 284-285;

principle of complementarity? The thesis, in addition to attempting to provide answers to this paradox also critically examined whether the doctrine of state sovereignty has any connection to some state parties' over eagerness to prosecute suspects of international crimes, and whether such over eagerness amounted to "unwillingness" or "inability" genuinely to do so within the meaning of article 17 of the Rome Statute.

In my view, over eagerness to prosecute seemed an apparent clash between doctrine of sovereignty of the nation state and the emergent international consensus for a supra-national accountability mechanism in the mould of the Court. As such, although provided for in article 17 of the Rome Statute, where a state overly eager to pursue domestic investigation and prosecution that is suggestive, albeit tacitly, that such a State Party is unwilling or unable genuinely to investigate and prosecute as delineated in the Chapeau of article 17 of the Rome Statute.

1.4.1 Specific Objectives of the Study

In order to arrive at the main objectives of the study, the topic was operationalised into several specific objectives as thus:

Firstly, the researched examined and reflected on the criticisms levelled against the Court, particularly as an erosion of state sovereignty. In this regard, the views of certain groups of respondents were sought, relevant commentaries and articles analysed and statements of key political figures reviewed.

Secondly, while having regard to ancillary issues like inconsistency in the manner of conducting the proceedings impartiality or independence, on the study explicated whether over eagerness demonstrated in such context cases pointed to an intent and concerted efforts to shield the suspects from justice before the Court. In addition, the study investigated the manifestations of unwillingness and inability to prosecute.

Finally, a conclusion is drawn whether over eagerness to undertake investigations and prosecutions by and through the national systems and courts tantamount to inability and unwillingness to

1.4.2 Research Questions

- i. What theory or theories underpin the eagerness of states, using complementarity, to pursue for domestic prosecution of international crimes?

- ii. What is the scope of "unwilling or unable genuinely to carry out investigation or prosecution" in Article 17 of the Rome Statute?
- iii. Whether there the eagerness for domestic prosecution can be construed as "unwilling or unable genuinely to carry out investigation or prosecution" within the meaning of Article 17 of the Rome Statute?

1.5 Scope of the Research

1.5.1 Conceptual Scope

The scope of the study was limited to issues revolving around the principle of complementarity, which is the foundation of the Court, enshrined in article 17 of the Rome Statute and attendant controversies that it has attracted. In particular, the study examined the theoretical foundations on which the criticisms of the Court is anchored as well as a delineation of the scope and form of unwillingness and inability genuinely to prosecute and whether over eagerness of a state to undertake national investigations and prosecution is evidence of unwillingness and inability stipulated in article 17 of Rome Statute.

1.5.2 Geographical Scope

Although the research area and topic is geographically neutral, a great deal of emphasis was placed on Uganda, and to an extent, Kenya. The emphasis on these two situations was partly due to Uganda's historical position not only as the first country to have made a referral to ICC, but for the radical transformation of its President from a supporter to a vociferous critic of the Court, and Kenya's situation which seem to be at the centre of the critics' arguments onslaught against the Court.

1.5.3 Time Scope

The study was not limited within a specific timeframe. However, suffice to note is on 17, July 1998, 120 states had adopted the Rome Statute, paving way for the establishment of the ICC. After ratification by 60 countries, the statute entered into force on 1, July 2002.

1.6 Justification and Significance of the Study

Accountability for impunity, war crimes and crimes against humanity has always been a concern for the international community hence the establishment of the ICC as a permanent and independent mechanism to prosecute such cases was widely viewed as heralding a new

era of accountability. However, in recent years as the Court began to undertake its mandate, it has faced intense criticisms especially from the African political elite who accuse it of selective prosecution of African and call for domestic prosecution of international crimes. The study therefore sought to examine the theories underpinning the criticisms and preference of domestic prosecutions by the African bloc- the erstwhile supporters of the Court whose ratification of the Rome Statute was crucial for establishment of the Court. Furthermore, with the threat of mass withdrawal from or suspension of cooperation with ICC by the African bloc, the study is topical and provided alternative measures and reforms to navigate the emerging challenges faced by the Court.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

While tracing the historical evolution of the doctrine of sovereignty and its gradual transformation into several variations, the Chapter examines the co-relation between state sovereignty and immunities and how each has impacted on the other. This discussion is made having regard to significant developments in international law and inter-state practices. The establishment of the ICC being a momentous development with far reaching ramifications for international relations and the quest for justice and accountability for international crimes, the Chapter highlights the Court's principle to complementarity and impact of the Court's activities of sovereignty and immunities. In this discussion, particular effort was to ascertain whether a state's eagerness to prosecute is significantly related to unwillingness and inability to prosecute by the state. This necessitated an explication of the notions of "unwillingness" and inability" as defined in Article 17 of the Rome Statute, and consequently, the Chapter also examines the theoretical scope and foundations of unwillingness and inability tests.

2.2 The theory of State Sovereignty and Immunities

The doctrine sovereignty has been conceptualised in multiple ways⁷, and its exact meaning often contested or constantly readdressed in the ebb and flow of politics⁸. While Jean – Jacques Rosseau (1762) who in *Social Contract and Principes du Droit Politique* expounded on the popular theory of sovereignty and Thomas Hobbes in the *Leviathan* (1651) are regarded as the leading exponents of the doctrine of sovereignty, the origin of the concept was traced to Jean Bodin (1530-1596), who according to Held (2002) should be credited as having developed what is commonly regarded as the first statement of the modern theory of sovereignty by asserting that there must be within every political community or state a

⁷ In his book *Rousseau's Theory of Sovereignty*, Pavlovic (2007) highlights the works of several authors on the sovereignty and its different forms such as political and legal sovereignty, internal and external sovereignty, sovereignty *de iure* and sovereignty *de facto*, influential, limited, relative sovereignty, among others.

⁸ Held (2002).

determinate sovereign authority whose powers are decisive and such powers being recognised as the rightful or legitimate basis of authority. Merriam (2001) traces origin of the theory of sovereignty further back in history to the classic body of the Roman Law and Aristotle who in *Politics* stated that there must be a supreme power existing in the state, and that this power may be in the hands of one, or a few, or of many.

Merriam (2001) extensively discussed the evolution of the doctrine of sovereignty through history - starting with a definition of sovereignty as the absolute and perpetual power of a commonwealth, to Grotius' views that sovereignty signifies that power should not be subject to the control of another and Hobbes' construct of absolutism in which he argued that sovereignty is neither delegated nor alienated by the people, for they were not a people until the sovereignty was created. Merriam proceeded to highlight Locke's theory whose central thesis was that the executive is, while within the law, supreme, the Legislature is the sovereign governmental organ so long as the government endures; and that the political society is the latent but becomes the active sovereign on the dissolution of the government.

Held (2002) observed that the two viewpoints on whether the rules governing the international political system are changing fundamentally; with one viewpoint postulating that a new universal constitutional order is in the making, with profound implications for the constituent units, competencies and structure of the international law, and the other viewpoint being profoundly sceptical of any such transformation by holding that states remain the leading source of all international rules, and remain anchored to, the politics of the sovereign state. This limited forgoing synopsis of the historical evolution of the theory of sovereignty validates the argument that political theories and the universal constitutional order are dynamic.

The concept, meaning and scope of the doctrine of sovereignty have not been exclusively debated by political theorists only but tested in judicial decisions relating to immunities. In *Regina v. Bartle and Others Ex Parte Pinochet*, the court extensively elaborated on the issues of sovereignty and immunity. Lord Millett argued that the doctrine of state immunity is the product of the classical theory of international law in which the states were supreme, sovereign and equal among each other and individual rights were outside the realms of international law, and consequently, states were obliged to abstain from interfering in the internal affairs of one another. Lord Millet further underlined historical rationale for the immunity of a serving head of state is enjoyed: that being regarded as the personal

embodiment of the state itself, the person of the head of state was inviolable, not criminally liable on any ground whatsoever and therefore it was considered an affront to the dignity and sovereignty of the state which they personifies and a renunciation of the equality of sovereign states to subject them to the jurisdiction of the municipal courts of another state; and to him, international law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. On his part, Lord Hutton while considering whether a former head of state, can claim immunity on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state, concluded, while drawing extensively from the international legal texts and explicitly making reference to Article 27 of the Rome Statute that impeached all forms of immunity, that such claim of immunity could not hold.

Lord Hope was prepared to find two exceptions to the principle of immunity which protects all acts which the head of state has performed in the exercise of the functions of government are: criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit; and, acts the prohibition of which has acquired the status under international law of *jus cogens*. Lord Browne-Wilkinson posed a fundamental question whether it can be claimed that the commission of a crime which is an international crime against humanity and *jus cogens* can be legitimately be claimed to be an act done in an official capacity on behalf of the state. Partial answers to this critical test was provided firstly by Lord Phillips opined that where international crime is concerned, that principle, no immunity *ratione materiae* could exist for a crime contrary to international law, and secondly by Lord Hope who observed that the obligations which were recognised by customary law in the case of such serious international crimes are so strong as to override any objection on the ground of immunity *ratione materiae*.

However, the view of Lord Millett that had Pinochet been a serving head of state he would not be extradited is distinguishable in that unlike prosecution before the court in Spain, the maxim *par in parem non habet imperium* (i.e. one sovereign state cannot adjudicate on the conduct of another) cannot hold with regard to ICC for it is not under the jurisdiction of any state.

Unlike with diplomatic immunities which are well developed and well-defined due to centuries of state practices and Vienna Convention on Diplomatic Relations, the contours of other areas of immunities like those of heads of state still remains murky and with unclear

conceptual foundation (Cryer , et al, 2010). However, premised on theories such as functional necessity theory and representative theory, immunity *ratione materiae*, or functional immunity has evolved as a customary international law for heads of state, or other high-ranking officials with respect acts performed while he or she was serving in an official capacity. According to Cryer, et all (2010), functional immunity, as opposed to personal immunity which is absolute, only protects conduct carried out on behalf of a state and attaches to a comparatively large class of officials who carry out State functions.

It has therefore been argued⁹ that unlike the heads of the other organs of government, the head of state is considered the personification of that state hence their sovereignty and consequently immunity is inviolable¹⁰.

The earliest attempt to regulate functional immunity was witnessed in the decision of Nuremberg decision¹¹ where it was observed that in certain circumstances, immunities granted under international law cannot be applied to acts which are condemned as criminal by international law shelter suspects behind their official position in order to escape liability for a person who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law. The principle was later to be restated in in *Attorney-General of Israel v. Eichmann*¹², where the court in rejecting the defence that the acts were carried out in course of official duties held that war crimes and atrocities of the scale and international character such as holocaust are crimes of universal jurisdiction under customary international law and that the fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to prosecution of the case.

In the case of *Regina v. Bartle and Others Ex Parte Pinochet*, the House of Lords discussed at great length the question of immunity in relation to international crimes. Lord Millett stated as thus:

⁹ <http://www.aalco.int/background%20paper%20ilc%2010%20april%202012.pdf>

¹⁰ Although contentious, Article 21 of the Annex to the Convention on Special Missions and Optional Protocol concerning the Compulsory Settlements (UNGA res. 2530 (XXIV) of 8 December 1969) appears to support this view.

¹¹ Judgment of the International Military Tribunal (Nuremberg) 41 AJIL (1947), 172.

¹² (1962) 36 I.L.R. 5

It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form. The idea that individuals who commit crimes recognised as such by international law may be held internationally accountable for their actions is now an accepted doctrine of international law. The adoption by most major jurisdictions of the restrictive theory of state immunity..., has made major inroads into the doctrine as a bar to the jurisdiction of national courts to entertain civil proceedings against foreign states. The question ... is whether a parallel ... development has taken place so as to restrict the availability of state immunity as a bar to the criminal jurisdiction of national courts.

However, *Ex parte Pinochet* appears to have raised more legal controversies than it resolved. Cryer, et al (2010: 540) argued that the extent of *Ex parte Pinochet's* implications remains shrouded in some uncertainty, and that the judgment is "one of those gems of the common law system in which however important the decision, it is difficult to identify the ratio decidendi"; adding that commentators tend to emphasize different passages to make different interpretations, and thereby arrive at different views as to the basis of the decision.

The case of *DRC v. Belgium*¹³ before the ICJ provided a test on the question of immunities of minister and heads of government. In this case, an arrest warrant was issued for DRC's foreign minister for alleged crimes committed under a Belgian law that established universal jurisdiction of its courts in relation to alleged grave violations of international humanitarian law and did not recognise recognize any immunities. The alleged acts were committed outside of Belgium, and at the time of issue of the warrant, the suspect was DRC's foreign minister and not present in Belgium, neither was he Belgian nor was a Belgian national was a direct victim of the alleged crimes, and, at the time of the judgment, the suspect no longer held any ministerial office. By majority decision, the ICJ held that Belgium had failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent foreign minister enjoyed under customary international law. The court held further that an incumbent minister for foreign affairs enjoys immunity from criminal jurisdiction while abroad and inviolability for acts performed either in an official private capacity whether those acts were done before assuming office or during the term of the office, even when the crime alleged is a war crime or crime against humanity. The ICJ also observed that immunity from foreign jurisdiction does not mean impunity because after a person ceases to hold such office, he or she ceases to enjoy all of the immunities accorded by international law but he or she may be held culpable in respect of acts committed prior or subsequent to his or her period of

¹³ *The Democratic Republic of Congo vs Belgium* (2002) ICJ Reports 14 Feb 2002

office, as well as in respect of acts committed during that period of office in a private capacity.

While making inferences from the *DRC-Belgium* case, Cryer et al (2010: 535) concluded that "similar principles undoubtedly apply to a head of government, such as a prime minister – whose representative function is more sensitive than a minister of foreign affairs". This judgement in *DRC-Belgium case* can be criticised to the extent of its implicit absolute impunity for crimes committed while acting in official capacity for being regressive to developments in contemporary international law that exalts human rights and accountability for international crimes as the judges in *Ex Parte Pinochet* had previously strenuously articulated.

2.3 The Principle of Complementarity under the Rome Statute

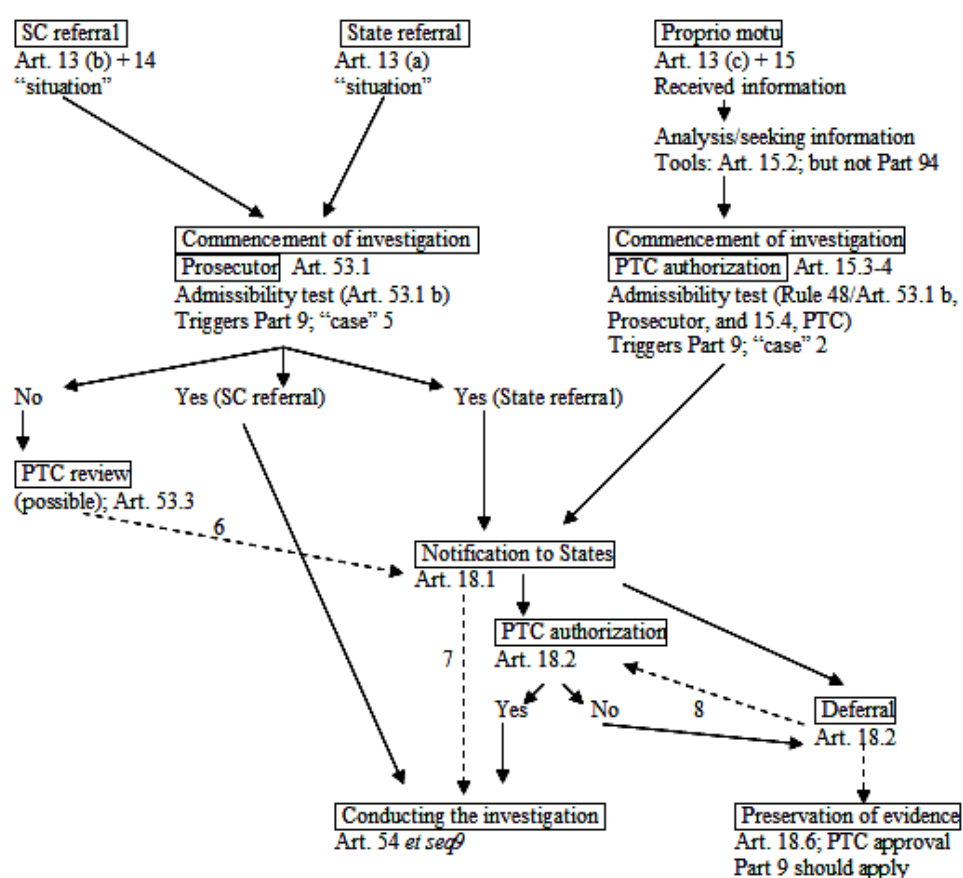
The principle of complementarity which recognises primacy of states' jurisdiction has been widely acclaimed as the cornerstone of Rome Statute and attracted the most attention and debate. The intense debate generated by complementarity is understandable given that it provides the framework through which the doctrine of sovereignty and immunities meet the quest for accountability and criminal responsibility in aftermath of violent conflict.

From the outset, the Rome Statute in its preamble, restates the criminal jurisdiction of every state over perpetrators of international crimes, and explicitly emphasises in the preamble and article 1 that the jurisdiction of the Court is complementary to those of national criminal processes. Indeed so entrenched is the principle of complementarity that the ICC itself admits that it is "not a substitute for national courts ... [but] can only intervene where the State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators" (ICC, 2011). Whereas several other articles of the Rome Statute such as art. 15, 18, 19, 20 and 53 make inferences to complementarity; the substantive element of principles is buttressed in article 17 which stipulates the "unwillingness" and "inability" tests for admissibility of cases brought before the Court.

Benzing (2003) asserted that complementarity is salient instrument to delineate the exercise of jurisdiction by the ICC from that of the national authorities or courts with the effect that national criminal jurisdiction plays a primary role whereas ICC has a subsidiary role restricted to supplementing the domestic investigations and prosecutions. Krings (2012) explained the rationale of complementarity to efficacy of local investigation in terms of

evidence gathering and access to witnesses on the one hand, and the need to maintain states' sovereign right to try criminals committed under their jurisdiction and close the gap in fight against impunity on the other. The role of complementary reaffirmation of sovereignty were also acknowledged by Phillippe (2006) who stated that the is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction, and Benzing (2003) who asserted that the principle was designed to protect and strike a delicate balance between state sovereignty and the international communities aspirations for criminal responsibility for egregious crime.

ICC Procedures and Complementarity



Adopted from ICC-OTP (2003), p. 27

2.4 The admissibility Challenge: “Unwillingness” and “Inability” Genuinely to Prosecute in Article 17 of Rome Statute

The concepts of “unwillingness” and “inability” have been described as disjunctive (Reichel, 56) and the Court’s credibility is premised on an appropriate interpretation and application of

the two concepts¹⁴. Unwillingness may be inferred from a variety of circumstances, ranging from direct political influences, institutional deficiencies and the subordination of judicial or political authorities. It may also be construed to stem from other pertinent political factors such as friendship and close linkage with suspects, police, investigators, prosecutors, and judges (Henzelin Heiskanen & Mettraux 265).

Even though unwillingness and inability are not specifically defined in the Statute, an attempt is made to set out the criterion for their determination out in the second and third paragraphs of article 17. The complementarity test is obfuscated by a superficial interpretation of article 17 that sets ground for the Court's intervention when States are found to be either unwilling or unable to carry out investigations or prosecution of accused persons.

2.4.1 The test of "Unwillingness"

An admissibility challenge on unwillingness is hinged on three alternative ingredients stipulated in article 17(2) of the Statute, and these are: national processes are or were used to shield a person from criminal responsibility; existence of an undue delay showing a lack of intent to bring the person concerned to justice; and, lack of independence and impartiality which is incompatible with the intent to bring a person to justice.

The notion of unwillingness which in its basic form entails a State's reluctance to undertake any criminal proceedings is neither explicitly defined nor its boundary exhaustively delineated under Article 17 of the Rome, a reason for which Phillipe (2006) observed that unwillingness is quite simple to understand but is more complicated to evaluate. A prominent case in point was when Uganda referred LRA situation to the ICC, which could be surmised as tantamount to a State's unwillingness to conduct trial on its own for various reasons – such as the scale and gravity of the alleged offenses and the need for rehabilitation and national reconciliation, and the belief that it would be of huge benefit to the victims (Sthan 269).

¹⁴ The notions of unwillingness and inability were essentially a fodder for protracted debates with some literature arguing that the term "genuinely" was best understood as a specification to "carry out" while other literature contended that the term was attached to the element of "inability". See M. Arsanjani, M. Reisman, 'The Law-In-Action of the ICC', (2005) 99 AJIL, 385-403, 398, W. A. Schabas, in contrast to what assumed by, *inter alia*, J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, *supra* n. 10, 114,

The notion of unwillingness has been confounded with high levels of subjectivity especially when viewed in light of a State sovereignty or from the perspective of individual rights (Henzelin Heiskanen & Mettraux 152). According to the provisions of Article 17 (2) of the Statute, determination of unwillingness is premised on a tacit consideration of the due process principles enshrined in the International law.

In essence, impartiality implies that the Court has an express mandate to intervene in all scenarios where it determines that domestic proceeding are merely employed as a façade to jeopardize the course of justice (Newton 58). The gist of an assessment by the Court is thus, the “spirit” of the instituted national proceedings.

Even though there are no other provisions of the Rome Statute or even Rules of Evidence and procedures that provides additional guidance on the criteria, factors or content of unwillingness, the indicators of unwillingness have been expounded by the OTP (OTP 62). In one of the indications, the OTP posited that assessment of reasons for shielding an accused person from criminal responsibility will tend to focus on the scope of investigation, preliminary assessment, and especially whether such investigation is directed towards minor offenders” or “marginal perpetrators” as opposed to individuals deemed to be most responsible for the crimes in question (OTP 72). Another potential indicator is the manner of conducting investigations and prosecutions at the domestic level, which may entail: insufficient prosecutorial or investigative steps; failure to include specific evidence; deviations from procedures and practices; intimidation of witnesses, victims and members of the judiciary, glaring discrepancies between the evidence produced and the findings, and allocation of inadequate resources for performance of proceedings (OTP 117). Furthermore, the issue of gravity of cases, although not precisely linked to domestic cases, has important implications in the understanding of the notions of unwillingness and inability of a state (OTP 123).

The assessment of independence of the national legal systems as an indication of unwillingness is premised on evaluation of the extent to which the judiciary may be considered to be independent, the pattern of trials that attain ‘preordained conclusions’ and the degree to which national courts are subject to political interferences (OTP 117). Other overt indications include: direct involvement of a State’s apparatus in the perpetration of international crimes, the degree to which actors of judicial proceedings are susceptible to corruption as well as the degree to which dismissal or appointment of judges and other

officials of the judiciary is influenced by political interferences. In addition, indications of impartiality stemming from State's apparatus may be revealed by connections between accused persons and organs mandated with the onerous duty of conducting investigations and prosecutions. Such linkages may also be established from public statements, dismissals, awards, replacements, promotions and sanctions involving officials from the judiciary (OTP 163). A general examination of national proceedings involving alleged perpetrators of international crimes may also serve as an indicator of a State's unwillingness. Such examination may focus on a myriad factors including: the number of investigations undertaken in an effort to collect substantial evidence, the modes of liability construed to stem from the evidence available, the adequacy of charges, the extent of victim involvement in the proceedings, and the overall investigative steps undertaken (OTP 167).

In reality, the assessment of unwillingness is a very intricate issue that demands an analysis on a case basis to ascertain unique factors and specific conditions of the particular case under examination. Given the diverse variations in the indicators of unwillingness, a prominent question that has been the subject of raging debates concerns whether the cardinal criteria listed in Article 17 (2) of the Rome Statute (unjustified delay in conducting the judicial proceedings, shielding crime perpetrators, and impartiality or lack of independence) may be considered exhaustive for purposes of demonstrating unwillingness or as mere illustrative instance of a multi-faceted reality (Ambos and Wierda 54). In the event the criteria in Article 17 (2) of the Statute is to be considered an illustrative case of the hypothesis of unwillingness, then judges would have an onerous duty and significant powers in assessing whether national proceedings conform to the standards outline in the Rome Statute (Daintith 37). Such wide avenues for assessing unwillingness would inevitably increase the possibilities of finding cases of unwillingness on other grounds (ibid). The challenges that were experienced in the course of drafting the Statute, specifically in reaching a consensus on the criteria of unwillingness, seem to imply that the criteria listed in Article 17 (2) of the Statute has been conceived as exhaustive (Robinson, 500).

2.4.2 The test of "Inability"

In article 17 (3) of the Statute, the parameter for determination of a nation's inability to prosecute or investigate a case is premised on whether a total or substantial collapse or the unavailability of a national judicial system has made it practically impossible for the State to conduct its proceedings or to obtain the accused person or the necessary testimony and other

forms of evidence. The phrase total or substantial collapse of a national judicial system essentially implies that the domestic system has suffered serious damages stemming from chaotic situations, which have affected the capacity of a State's judicial system (Arsanjani 677). The OTP has argued that this provision was essentially introduced to address situations in which objective factors hinder a State from discharging its legal mandate of investigating and prosecuting suspects.

A subtle element of Article 17(1) of the Rome Statute is its construction in a way that alludes to a State's active initiation and involvement in judicial proceeding within its jurisdiction. For instance, according to Article 17 of the Rome statute, a case is deemed to be inadmissible before the ICC when a State actively initiates its own proceedings. This mandatory requirement is exemplified in article 17 (1) (a) under which a case can only be declared inadmissible before the ICC where: it has been investigated or prosecuted by a State with jurisdiction over it.

In this regard, it has contended that Article 17 (1) (a) (b) and (c) in effect, seeks to entrench the notion that the jurisdiction of ICC with regard to examination of unwillingness and inability is limited in instances where a nation is deemed to be inactive (Robinson 67). The forgoing inferences, which serve as the basis for distinguishing unwillingness from inactivity, appear to be drawn from the wording of Article 17 (2) which stresses the notion of unwillingness to genuinely conduct a trial.

According to Williams and Shabas, Article 17 (2) (a) basically addresses the main concern of a nation that is focused on attaining the letter of the Statute by undertaking prosecutions or investigations, but not the spirit of the Statute. Several techniques can be employed by any state that is keen on employing the spirit but not the letter of the Statute. One prominent way is by conducting an investigation in which the accused person is convicted of ordinary crimes and not international crimes as delineated in Article 5 of the Rome Statute thereby bringing into play an additional test of whether such processes cover both the person and the conduct which is the subject of the case before the Court. This essentially means that an accused person must face trials for alleged international crimes under a competent national court. A failure by any State to institute relevant charges for an alleged perpetrator of international crimes would be tantamount to shielding the accused person from criminal responsibility. The act of shielding an alleged perpetrator of international crimes might constitute unwillingness under Article 17 (2) of the Statute. Other clear indications of a nation that is involved in

shielding an accused person include use of secret trials instead of public ones, departure from a nation's standard and legal procedures and instances where proceedings reek of sham trials.

Article 17 (2) (b) does not explicitly mention the factors that need to be considered by the ICC in relation to unjustified delays as an indication of unwillingness. However, Ambos and Wierda posit that a prominent indicator of a State's unwillingness may be construed from the period it takes to initiate and conduct proceedings of international crimes and other regular domestic cases of a similar subject matter and approximate complexity. If regular domestic proceedings of similar complexity and which focus on an equivalent subject matter appear to take a shorter duration than similar international crimes undertaken by the domestic courts then the ICC can suspect a nation of being unwilling to bring to justice an alleged perpetrator of international crimes.

In addition, the assessment of impartiality and fairness of any trial conducted under the domestic jurisdiction of a State must inherently take into consideration any significant departures in a nation's typical standards of due process in relation to the international crime cases that it has to handle. Such standards would include those described in Article 17 (2) (b), the relationship between an accused person and the presiding judges if any, and the relationship between an accused person and witnesses, if any (D'Amato 81).

The test of inability as outlined in Article 17 (3) appears to be a little more straightforward when compared to that of unwillingness. The cardinal factor to be considered by the ICC in ascertaining a nation's inability to prosecute concerns whether the nation has experienced "a total or substantial collapse or unavailability of its national judicial system", which has consequently led to the nation being "unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." The criterion for assessing inability as outlined in the Statute is objective and fact based, and does not rely on motive (Daintith 241). Inability was incorporated in the Statute to address situations where institutions and infrastructure of a State were experiencing or had experienced total collapse (Sthan 213).

Whereas unwillingness has a negative connotation, Benzing (2003) and Trahan (ND) discussed its antithesis – overzealousness, or colloquially expressed by Trahan, all too willing to investigate and prosecute a suspect. Benzing asked a pertinent question whether it was necessary for the Court to have regard to the principles of due processes recognised by

international law to intervene and declare a case admissible if a state fervently and overzealously, not to shield the suspect, but to subject them to prosecution in blatant disregard for the rights of the accused.

After appraisal of the ordinary meaning of the "unwilling", Trahan concluded that it is hard to argue that "all too willing" national court prosecutions fall neither within the term "unwillingness" nor "inability". In my considered opinion, I disagree with this restrictive and literal interpretation of unwillingness and inability raises a number of questions: what would be the motive underlying a state's overzealous, or as Trahan coined, unjustified haste? If the ICC's primary mandate is promoting accountability and justice for crimes that of concern to the international community, what arguments can be used to bar it from lifting the veil to examine this over-eagerness? Shouldn't overzealousness be construed as prejudicing a suspect's right to a fair trial hence be purposively interpreted as constituting inability having regard to the often forgotten subtle test of "genuinely"? If unwillingness is often examined, what is the legitimate basis of prohibiting an examination of over-willingness?

Curiously, but in a line of argument that supports by view against restrictive interpretation of overzealousness, Trahan agrees, in case of crimes of aggression, with other authors that overzealousness should be a cause for concern because there must faithfulness to the demands of fairness and that if the ICC simply turns a blind eye to unfair national trials, the effect would simply permit States to replace one kind of impunity with another. The risk of restrictive interpretation occasioning a miscarriage of justice is clearly highlighted in by the fact that using such rule, the lack of substantive laws or legislations, and existence of immunities in national laws would not per se amount to inability within the meaning of article 17 (3) of the Rome Statute.

2.5 Conclusion

The contrasting, sometime conflicting conceptualisation of what sovereignty means in practice is amplified greatly particularly with regard to the discourse in international relations.

The undeniable fact is that in recent years, contestation among different schools of thoughts have catalysed developments in international law which has caused a considerable transformation in the scope and form of erstwhile etched doctrine state sovereignty, and by extension immunities. The transformation of state sovereignty and immunities was further accelerated by international treaties amplifying human rights, ad hoc tribunals and supra-

national courts that have in most instances refined and narrowed their scope. The creation of the ICC therefore represents as an outcome and institutionalisation of the refinement and redefinition of the doctrine of state sovereignty and attendant immunities that are consequent therefrom. However, the transformation has not been without resistance nor achieved universality yet as there remains states that challenge or oppose these developments.

The principle of complementarity, a cornerstone of the Rome Statute was a shrewd proposal that though in principle sought to preserve the sovereignty of states but within the overall spirit of tackling impunity and crimes that causes moral outrage among humanity, also caused tension amongst enthusiasts of state sovereignty. However, although the Rome Statute does not precisely define the notion of unwillingness and inability in relation to inability genuinely to investigate and prosecute international crimes, it does provide for circumstances under which these may be imputed. Even so however, there are some outlier instances which would become problematic if a restricted view ingredients of unwilling and inability were taken. For instance, can a state's self-referral be imputed for unwillingness, or can lack of domestication of the Rome Statute *prima facie* constitute inability?

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

The Chapter discusses the research paradigm and related methodology which were applied during the research. Therefore, the Chapter highlights the research design, sampling techniques, data collection methods and instruments in addition to practical issues such as constraints to the study and data management. The justifications for the methodological choices made are explained.

3.2 Research Design

A qualitative, as opposed to a quantitative paradigm is more appropriate for a research whose approach is oriented to the construction of meaning from the perspective of those within a social setting through the asking of “what” and “how” questions (Hesse-Biber, 2010). Hesse-Biber therefore advocated adoption of qualitative paradigm which is more suitable for the exploration of the specific dynamics or processes of everyday life or a specific social context which are often difficult to quantify or remain hidden. It was on these considerations that I adopted a qualitative research design as the most suitable for the study - to examine the veracity of the assertion that the clamour for prosecution of international crimes in domestic courts as to ICC was a façade to assert national sovereignty, and in some instances a subtle attempt to exculpate the suspects through a contrived domestic judicial processes.

3.3. Geographical Areas

Although the study was conducted in Uganda, the scope of the research area meant that a lot of literature and opinions of experts from other countries, particularly Kenya were made. As earlier stated, the rationale for the choice of Uganda was its historical role as the first country to have referred a case to the Court, and the subsequent fallout of its political leadership with the ICC. Similarly, the interest in Kenya had historical undercurrents, its president being the first sitting head of state to be prosecuted before the Court hence at the centre of the question of complementarity.

3.4 Study Population

Being an inquiry on whether over eagerness to prosecute was anchored in the doctrine of state sovereignty, whether such eagerness was a tacit indication of "unwillingness" or "inability" within the meaning of article 17 of the Rome Statute, the research had no distinct study population. However, the targeted sources of primary information included: members of parliament, not least because of their involvement on policy and political debates surrounding relation of African State Parties to the ICC but also as primary actors in the domestication of the Rome Statute, CSOs, legal practitioners, columnists, academia and members of the diplomatic corp.

3.5 Sample Size and Sampling Techniques

3.5.1 Sample Size.

It is often undesirable to study all units in research undertakings involving a large study population due to the costs involved, the labour required and the time that would be consumed. Walliman (2011) proposed a solution - examining few units through sampling with a view of generating data which can be imputed as representative of the rest. However, such samples, Sandelowski and Barroso (2007) cautioned, should not be so large as to preclude rigorous scrutiny thereby weakening the validity of a research or exceed a researcher's ability, nor should it, according to Kothari (2004), be too small but an optimum number which can ensure representativeness, reliability and flexibility.

Accordingly, Hesse-Biber (2010) suggested that in qualitative research designs like this present study, between 3-5 participants is sufficient. However, in light of the above considerations, and the unlikelihood that all targeted respondents would accept to participate in the study, I considered an overestimated sample size of 50 participants as sufficient for the purposes of the study, the overestimation being premised on Lewin's (2005) advice as a strategy to tackle attrition or non-response from respondents.

3.5.2 Sampling Techniques.

Against the backdrop of Walliman's (2011) argument that careful sampling reinforces objectivity, reliability and generalizability of findings, I adopted three sampling techniques in order to achieve these. The combination of sampling techniques used, as described in detail below, was: purposive sampling, snow-ball sampling and theoretical sampling.

Purposive sampling was preferred in line with Walliman's (2011) endorsement of technique as suitable for studies where description rather than generalisation is the goal, and augmented by an earlier assertion of Kothari (2004) who argued that the technique has a favourable resource implication, despite the threat posed by subjectivity to validity of the conclusions pointed by Jupp (2006).

The purposive sampling technique was used in parallel with the snowball sampling, the latter having been classified by Dawson (2009) as a variant of the former technique and recommended by Barbour and Schostak (2005) as apposite where the researcher is not aware, at the onset, of the relevant informants. Snowball was particularly efficacious given complexity and technical area of the research topic which necessitated focusing efforts of data collection from a narrow and knowledgeable category of key informants.

In addition, theoretical sampling was adopted as a mutually reinforcing and complementary the purposive and snow-ball techniques. Although theoretical sampling does not require a pre-determined sample size (Punch, 2000), the pre-determined sample size that was proposed was for the purpose of providing a benchmark in case absolute saturation was not achieved within the pre-determined sample frame.

3.6 Data Collection Methods and Instruments

The research involved a review and analysis primary and secondary information relating to the research topic. In this regard, extensive literature and the debate on topic of complementary were reviewed and analysed and information obtained from key informants.

With regards to obtaining information from key informants, I preferred to use interview and questionnaire data collection methods concurrently. While authors like Kothari (2004) and Jupp (2006) have highlighted several drawbacks such as bias, cost, time consumed, and strain involved in creating rapports with respondents associated with the method, interviews constituted a major data collection method due its noted positive attributes such as its flexibility (Dawson, 2010), its suitability for understanding perceptions (Berg, 2001), and critical reflections and for gaining deeper insights into complex issues (Hesser-Biber, 2010). In addition to the interviews, questionnaires also constituted another data collection method. Despite stating limitations such as being inflexible and risk of low response, Kothari (2004) and Jupp (2006) also conceded that questionnaire is less costly and reduces bias as in comparison to interviews.

3.7 Data Management and Analysis

The information interviews were recorded under assigned coded names and constantly analysed as more and more data were being received. The information collected and literature reviewed was systematically coded and qualitative analysed using the methodology of grounded theory. The assertions of informants, opinions of legal practitioners and columnists, statements of agencies and political figures, arguments in cases before the Court were analysed to formulate the different shades of theories underpinning or fanning the attacks on the Court and whether eagerness by states for domestic prosecutions is indicative of "unwillingness" or "inability" by a state genuinely to prosecute within the meaning of article 17 of the Rome Statute.

3.8 Ethical Considerations

A number of ethical questions such as privacy, confidentiality and objectivity among others are often confronted by a researcher during the course of the study. In this regard, I solicited voluntary participation in the study, maintained strict confidentiality and respected respondent's wishes to remain anonymous through the use of pseudonyms and prior permissions were sought beforehand for direct attribution while information gained during conversation on the research topic, though used, were not directly attributed to the respondents. Furthermore, the information obtained were used and disseminated strictly for academic purposes.

3.9 Constraints of the Study

Regrettably, international criminal justice has become a polarising and politicised issue. This in the case of Uganda has been exacerbated by the President Museveni's acerbic criticism of the Court hence the research topic caused some jitters in some respondents. This challenge was further compounded by the fact the certain categories of respondents, for instance judicial officers and prosecutors, exercised a great deal of self-censorship. The reluctance of some respondents to provide information which was attributable to 'research fatigue' on the one hand, and sensitivity of the research topic on the other proved to be a considerable obstacle to the study.

CHAPTER 4

PRESENTATION OF FINDINGS AND DISCUSSION

4.1 Introduction

Whereas Chapter two focusses on the theoretical aspects of and interactions between sovereignty, immunities and complementarity, the present Chapter, on the basis of expert views, examines the validity of the claim that the operation of the Court is selective and impinges on state sovereignty. On the basis of the Court's judgements interlaced with relevant literature, complementarity, a cornerstone of the Court's operation is examined with a particular focus on the scope of the notion of unwillingness and inability. The Chapter is capped by a brief conclusion.

4.2 State Sovereignty and the Complementarity in Practice

The transformation of the attitudes of political elites in some African states bloc of the ICC has been extraordinary – from being avid supporters of the Court to its harshest critics. The leading supporter turned critic of ICC has been President Yoweri Museveni of Uganda who from setting history as having been the first to refer a case to ICC then later turning against the Court and mobilising the African Bloc to withdraw from the Rome Statute en masse. In the past years, Museveni has used every opportunity to attack the Court, variously accusing it of blackmail, being a neo-colonial tool serving interests of foreign powers, as having veered off its mandate and "in a shallow, biased way continued to mishandle complex African issues".

On the accusation that the ICC is a foreign imposition pursuing imperialistic interests in Africa, Nsereko¹⁵, an eminent Ugandan law professor who has served as a judge of ICC and the Special Court for Lebanon provided a forceful rebuttal as thus:

¹⁵ During a seminar on International Criminal Justice, Challenges for domestic prosecutions and programmes for victims' access to justice and reparations" on 26, September, 2013 at the Conference Room, Parliament of Uganda.

Out of the 122 states that have to date signed [2013] on to the Treaty, 34 are African. Thus African states constitute the single largest bloc of countries who are States Parties to the Rome Statute... Save in the case of a UN Security Council referral, the Court exercises its jurisdiction only over those individuals who are either nationals of a State Party to the Rome Statute, or who have committed an alleged crime on the territory of a State Party. We can therefore right away refute the belief, in some quarters, that the ICC is an imposition of some powerful states over weaker states, particularly African states, or that it is an institution of the erstwhile colonial or imperialist powers, pursuing neo-colonial or imperialist agendas. Indeed some of the most powerful states on the world stage are not even States Parties^[16]. The Court is a consensual institution based on treaty, and is fully financed from contributions from its members.

On the accusations that the Court has been unfairly targeting Africans and for deliberately trying to undermine the African States' sovereignty and independence, Nsereko (2013) tested the veracity of this assertion against three benchmarks: Africa's relationship to the Court, how the situations came to the Court, and whether or not African states have been unfairly prevented to exercise their domestic jurisdiction. Nsereko noted, firstly, that the ICC is a consent-based body, which states, in the exercise of their national sovereignty, join voluntarily by signing on to its Statute; secondly, that of the 8 situations before the Court, five were referrals by African states themselves, two i.e. Dafur and Libya were referrals by UN SC, and during the Dafur referral, Tanzania and Benin who were in UN SC supported the resolution, even when US abstained whereas in Libyan case, South Africa and Nigeria sponsored the UN SC resolution. In the Kenyan situation, only when the dithering in the domestic became apparent was the case referred to the Prosecutor. Annan (2013) in his article '*Justice for Kenya*' provided insights to the referral:

Kenya's leaders initially [had] agreed to establish a special tribunal [to prosecute the cases], but proposals for a court were defeated twice by Parliament. It was on the back of these broken promises for justice that, in July 2009, I complied with the commission's recommendations and handed over the sealed envelope to the I.C.C. prosecutor. In the absence of national steps toward accountability, the prosecutor decided, with the approval of the judges of the court, to open investigations. There have been active efforts to paint the I.C.C. cases as an assault on Kenya's sovereignty [and]... the meddling of "foreign powers." But the record is clear and there should be no doubt: it was the Kenyan government's own failure to provide justice to the victims and their survivors that paved the way to the I.C.C., a court of last resort. These trials also do not reflect the court's unfair targeting of Africa, as has been alleged.

¹⁶ Three of the permanent members of the UN Security Council US, Russia, China have not ratified the Rome Statute

On his part, Justice Moses Mukibbi¹⁷, Head of Uganda's International Crimes Division of the High Court argued that complementarity embodies three concepts one of which is maintenance of state sovereignty where a state carries out its duty of exercising criminal jurisdiction over those responsible for international crimes.

The civil society in Uganda has been almost unanimous in its support for the Court and rebuffed accusation that investigation and prosecution by the court is an inimical to sovereignty. Jane Anywar¹⁸ explained that:

...[the] move by African States... to withdraw from the ICC ... based on a number of allegations the most prominent being that ICC targets Africa's weaker States ...[cannot hold because] under the Rome Statute, the ICC is not a court of first instance; it complements national jurisdictions...[and], normally, targets the most senior perpetrators for prosecution... We want to point out that the global concern that led to the creation of ad hoc courts and finally the establishment of a permanent court (i.e. ICC) to try international humanitarian crimes is the efforts to end impunity for heinous crimes that shock human conscience. The focus is not the states or head of states the focus is protection of victims and investigation of heinous crimes irrespective of who the perpetrators are; the ICC is not established to investigate or prosecute states it is about prosecution of individuals whether they are still in power or not.

Having analysed the arguments of the contending sides to the debate, a finding that is drawn is that the arguments of the critics of the ICC as an erosion of state sovereignty and neo-colonial machinery targeting African is spurious. This is because as observed by Nsereko (2013), the Court is treaty based with voluntary accession, and the principle of complementarity rather than erodes, in fact preserves and reinforces state sovereignty. By introducing a legal text prohibiting crimes of aggression¹⁹ for the first time in history, the Rome Statute in fact buttresses state sovereignty by criminalising military actions against a sovereign state. Furthermore the now avowed critics of the Court, notably Uganda and Kenya

¹⁷ Justice Moses Mukiibi in *Complementarity in Practice in Uganda* during a seminar on "Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo" on 17, July, 2014 at the Conference Room, Parliament of Uganda.

¹⁸ Jane A. Anywar from Women's Initiatives for Gender Justice in her presentation, *The complex nature of the conflict, states cooperation & capacity to prosecute international crimes* during a seminar on International Criminal Justice, Challenges for Domestic Prosecutions and Programmes for Victims' Access to Justice and Reparations" on 26, September, 2013 at the Conference Room, Parliament of Uganda.

¹⁹ Article 8, Rome Statute

have domesticated the Rome Statute²⁰. It is my view that since the doctrine is neither static nor frozen in time and space, sovereignty should be viewed as a living and adaptive doctrine whose concept is evolutionary and will remain susceptible to change as long as its context changes. Therefore in this regard, it is my conclusion that even if the Rome Statute were to be argued to have fundamentally eroded the doctrine of sovereignty, such should not be the reason to defeat the noble ideals of the Court for doctrine of sovereignty has in the course of history undergone marked transformation in its conceptualisation

The doctrine of sovereignty having been found to be tenuous with respect to criticism of the court, it is imperative to investigate further the root of arguments of the opponents of the Court. The crux of the aversion by the African political elite in power to the Court seem in the Court's unlimited jurisdiction over all perpetrators of international crimes irrespective of status and immunity that such suspects may enjoy within the countries.

In explaining the sudden change of attitude toward the Court by some state parties, a theory that was consistently reiterated by the respondents who participated in this study was that this is rooted "self-interest". This theory is shared in several commentaries whose reviews indicates that dominant school of thought among opposition politicians, media commentary, CSOs, and academia that linked opposition from political elites to "self-interest" in protecting their own prosecution before the Court.

Mutaizibwa (2013) quoted an international law don who argued that with the Kenyan indictments, many African heads of state being potential indictees were rattled and had to now tread carefully and have strategically attacked the Court to surreptitiously undermine its credibility. At an international PGA seminar on international criminal justice and challenges for domestic prosecutions in 2013 held at Uganda's Parliament, the view that resentment towards the ICC was due to self-interest kept reverberating with prominent a human rights lawyer making the arguing that "all the African leaders who are opposing the Court are potential suspects". In the Kenyan situation, the very critics of the Court had initially strongly preferred it in place of the local investigations and prosecutions.

²⁰ Kenya enacted the International Crimes Act in 2008 and Uganda's ICC Act (Act No.6 of 2010) came into force on 25th June 2010. Both Acts are the Rome Statute *mutatis mutandis*. In section 27 of Kenya's ICC Act and section 25 of Uganda's, the existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for refusing or postponing the execution of a request for surrender or other assistance made by the ICC; nor holding that a person is ineligible for arrest or surrender to the ICC under this Act; or holding that a person is not obliged to provide the assistance sought in a request by the ICC.

In his latest attack on the ICC²¹, President Museveni assailed the ICC for being misused by "pushers of the hegmonistic agenda" and that the Court disregarded the AU resolution barring summoning of sitting presidents. Arguing that the post-election violence in Kenya was ideological, he proceeded to lambast the Court for handling what he termed as an ideological problem through legal means as the "highest level of shallowness". In the ensuing debate in the aftermath of the President Museveni's latest attack, a section of opposition politicians in parliament have accused the president of demonstrating the highest level of double standards and questioning the changed stance in light indictment of sitting presidents.

The decision of the AU during its extraordinary session on 12, October 2013²² confirms that the presidential immunity, guised under doctrine of state sovereignty, is at the heart of the scathing criticisms of the Court. In its decision on Africa's relation with the ICC, the assembly stated that it:

Reiterates AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya...; Underscores that this is the first time that a sitting Head of State and his deputy are being tried in an international court; Stresses the gravity of this situation which could undermine the sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions; Reaffirms the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office.

That self-interest is the primary motive behind the attacks on the Court has been grounded by the latest proposal from Kenya for the amendment of the Rome Statute for the consideration of the assembly of state parties in December 2014. The most critical proposal directly relevant to this study relates to article 27 in which Kenya proposes that serving heads of state, their deputies and anybody acting or entitled to act as a head of state be exempted from prosecution during their term of office. In addition to confirming the self-interest theory for they shouldn't have waited for the indictment of high profile political figures to present the proposals, the suggestions cannot stand the test of rigorous scrutiny. Firstly it is based on the assumption that all the state parties have an unalterable term limits and at one point their

²¹ During the celebration of Uganda's 52 Independence Anniversary on 9, October at Kololo in Kampala.

²² Ext/Assembly/AU/Dec.1(Oct.2013)

heads of states will relinquish power. Secondly, delay on bringing perpetrators to justice has enormous risks including tampering with witnesses and is contrary to the core mantra of justice – which is justice delayed is justice denied. Thirdly, the proposal creates room for manoeuvres such as assignment of suspects to office granting immunities. Fourthly, the proposal in trying to shield persons who may be most responsible for atrocious crimes is a blatant attempt to reverse the gains under international customary law to effectively grave crimes.

4.3 The scope and forms of unwillingness and inability to prosecute:

As to be expected from trial experiences before national courts, technicalities and in the case of ICC, challenges to the jurisdiction of the Court or case admissibility provided for in article 19 of the Statute has been the first point of defence. However, this in turn has provided conducive ground for jurisprudence in many aspects of the Statute; particularly on issues of admissibility of a case in accordance with article 17 to be discussed at great length as contending counsels stretch the boundaries of what constitutes unwillingness and inability genuinely to carry out investigations and prosecutions.

4.3.1 The test of “Unwillingness”

The notion of unwillingness has been discussed in two decisions that ICC judges had to make on admissibility. The judges focused on another form of unwillingness that is not enshrined in Article 17 of the Rome Statute and, which proposes another forum as the most appropriate avenue for prosecution of cases. In the *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (paras. 58), admissibility of the case before the ICC was the main concern of the defendant. The defendant claimed that investigations against him had already been instituted in DRC. However, the investigations were not for the same charges the defendant was facing at the ICC. Trial Chamber II held that the cases were admissible before the court—a decision that was largely grounded on the legitimacy of bringing cases to the Court later withdrawing them from the domestic court. The Chamber’s reasoning was founded on reinvention of the admissibility test with an emphasis on conferring jurisdiction to the ICC in the event a State was found to be either unable or unwilling to prosecute or investigate. The Chamber assessed unwillingness and established that DRC was actually unwilling to prosecute. The second form of unwillingness upon which the Chamber based its decision was

one in which a State is interested in bringing an accused person to justice, “but not before national courts (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, paras. 77). this form of unwillingness was quite different from that provided in Article 17 (2) of the Rome Statute which focused on “unwillingness influenced by the desire to hinder the course of justice”. On appeal, the Appeals Chamber, however, did not delve into an examination of Chamber II’s interpretation but instead, focused on restoring the correct meaning of the notion of unwillingness as outlined in article 17 (1) (a) and (b) (Hall, 189).

A similar application was later brought before Trial Chamber III in *The Prosecutor v Jean-Pierre Bemba Gombo* where the Chamber noted that there was a distinct difference between unwillingness underscored in article 17 (2) of the Rome Statute and unwillingness of a State to prosecute an accused person in its national courts.

The decisions of the Court in both *Katanga and Bemba cases*, therefore, implied that unwillingness was not a fundamental standard shaping the Court’s decision on admissibility even in the wake of ongoing domestic proceedings as highlighted in article 17 of the Statute. The second form of unwillingness is essentially not a legal factor but a politically construed notion that underscores a State’s determination to waiver its right of trial and instead hand it over to the ICC. The Court’s decision in both *Katanga and Bemba cases* basically imply that the notion of unwillingness as delineated in article 17 of the Statute is yet to be explored by the ICC Prosecutors with a focus on specific cases and situations. The notion has never been the subject of debate by the judges of the ICC (Sthan, 261). The implications are therefore, far reaching especially in relation to the application of article 17, with most of its content, indicators and factors remaining unexplored so far (Ambos and Wierda, 64).

Another aspect of unwillingness that is not expressly delineated under Article 17 (2) of the Rome Statute was underscored by the ICC in *Katanga case*. The Court observed that even though nations might desire to bring alleged perpetrators of international crimes to justice, they may not desire to prosecute the accused persons in national courts for a variety of reasons (Daintith, 228). This scenario varies significantly from the one expressed in Article 17, which focuses on nations that do not desire to bring accused persons to justice. In both instances, the nations concerned are basically ceding jurisdiction to the ICC and thus, it can be surmised that these provisions were not addressed by Article 17 which focuses exclusively on concurrent jurisdiction (Daintith, 238)

The admissibility challenges and the assessment of "same conduct" tests considered by the Court in *The Prosecutor V. Saifal-Islam Gaddafi and Abdullah Al-Senussi* and Kenyan cases provide an exemplary illustration of instances where Article 17 of the Rome Statute has been employed to provide guidance of the Court's diverging rulings. These crimes saw the ousted Libyan president and six Kenyans face trial at the ICC. However, the plea by the Libyan Government to declare these cases inadmissible and the repeal of the surrender of Saif Al-Islam Gaddafi and Abdullah Al-Senussi were granted, whereas the inadmissibility requests by the Kenyans were overruled. Articles 17 and 19 of the Rome Statute guided these diverging rulings of the ICC. In a report submitted to the ICC, Sands, Akhavan and Butler (3) stated that the Government of Libya should try the two suspects within its national judicial system. They argued that the Libyan Government regarded these two cases as matters of highest national importance and was committed towards ensuring effective and genuine investigation and prosecution of these two individuals (Sands, Akhavan and Butler 7). Furthermore, the country was committed towards a full-scale reform that included the judiciary system, and had already made significant progress in this arena (Sands, Akhavan and Butler 6). The validity of these facts could be asserted only when the representatives from the ICC could monitor these proceedings in Libya.

In *Al-Senussi's case*, the Court appear to have adopted a liberal approach in its interpretation of the elements of unwillingness observing that although alleged violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the Statute, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. This approach is marked progressive when reflected against that argument of Trahan's (ND) view that overzealousness is immaterial to the consideration of a state's unwillingness.

In concluding that Libya is not unwilling genuinely to carry out its proceedings against Al-Senussi within the meaning of article 17(1)(a) and (2) of the Statute, the Court proved that it has not usurped the powers of sovereign states over persons suspected to have committed crimes under their jurisdiction.

The Kenyan situation was entirely distinguishable from the *Libyan case*. In the former case, the prosecution raised concerns regarding the absence or non-existence of national proceedings aimed at investigating and persecuting suspects for injustices committed during the post-election violence. On these grounds, Pre-trial Chamber II judges, denied inadmissibility request by the defendants. An appeal for admissibility in Case 2 was also denied after the Appeal Chamber noted that the Kenyan Government had not made significant progress that would enable the cases to be referred to the national judiciary

The relevance of domestic proceedings in Kenya stems from their presentation by the Kenya government to challenge admissibility of two cases whose investigations were initiated *proprio motu* by the ICC Prosecutor (D'Amato 162). Although the admissibility challenge was filed by the Kenya Government in line with Article 19 (2) (b) of the Rome Statute, it fundamentally sought to validate the alleged inadmissibility of the two cases involving Samoei et al on one hand, and Kirimi et al, on the other hand.

The Kenya government presented two main arguments to challenge admissibility of the two cases before the ICC. Firstly, it alleged that judicial reforms were undergoing at the time the application was filed and that such reforms empowered the state to commence charges against persons deemed to have been criminally involved in the international crimes that occurred during the post-election violence of 2007 and 2008. Secondly, the Government challenged the same person element of the “same person - same conduct test”.

In making its submission on the “same conduct” but not the “same person” test, the Kenyan government contended that Kenya’s judicial system was already undergoing reforms following the commencement of investigations by ICC Prosecutor in Kenya. To further ground its case, the government cited some of the judicial reforms that had already been undertaken as well as those that were in the process of implementation. It also premised its argument on the ability to investigate and effectively prosecute those found to have committed international crimes within its territory. The Kenyan government further argued that part of the reason for undertaking judicial reforms was to demonstrate compliance with statements from the ASP which had encouraged Kenya to demonstrate democratic maturity through the establishment of reliable and effective proceedings. The Kenya government also argued that the complementarity principle recognized the position of Kenya as a sovereign

state and thus, the two cases needed to be declared inadmissible before the Court, since the Court “does not enjoy primacy over Kenya’s jurisdiction”.

Part of the submissions put forward by the Kenya government also involved a request to be allowed to implement reforms and prepare ground for investigative procedures (Muthaura, Kenyatta and Ali para 16). The Government therefore requested the Chamber to postpone the date for confirmation of hearing. While acknowledging that reforms were underway, the Kenyan government also contended that the current progress made in the reform process could not practically be realized “overnight” (Muthaura, Kenyatta and Ali para 16). It sought to ground its submission by polemically contending that in other instances such as the Russia, Colombia, Georgia and Afghanistan, the Prosecutor duly allowed the government of those countries to initiate primary investigation after noting that the respective countries had made public announcements of the commencement of investigation in related cases (Muthaura, Kenyatta and Ali para 16). The government further stated that the initiation of investigations implied that Kenya was not unwilling as stipulated in Article 17 (2) and as such, the presumptive criteria of the case being inadmissible before the court should be employed (ibid). Citing *Katanga's case*, the Kenyan government argued that admissibility is an issue that needs to be assessed and determined at the specific time when an application had been tendered before the court.

The ICC Prosecutor offered an alternative view of the admissibility test, asserting that the Kenyan Government had categorically failed to adduce evidence as proof that the cases before the Court were under investigation or prosecutions at the national level. The prosecution further argued that if there were ongoing investigations undertaken by the Government in relation to different conducts by different individuals, then the cases that were subject of the Court proceedings were not the same cases as the ones that were the subject of proceedings at the national level. The Prosecutor also argued that a mere promise to undertake investigations or prosecution could not amount to a declaration of inadmissibility. A challenge of admissibility would only suffice if the government of Kenya would initiate proceedings against the same individuals for the same conduct.

In their submissions Ruto and Sang alleged that the cases facing them were inadmissible since they were already under investigations at the national level for the same conduct. They further argued that the Kenya government was not unwilling or unable to conduct the

proceedings against them. Part of their discussion also involved the concept of “case” where they contended that for purposes of admissibility as stated in Article 17(1) (a) of the Rome Statute, the definition of “case” was actually more comprehensive and wider than the “same person- same conduct” test which they claimed was appropriate only to *ne bis in idem* proceedings. The reasoning behind such argument was that there was a likelihood of the confirmation of charges assuming a different approach from that presented by the Prosecutor following the investigative phase.

The Kenyan Government, in its reply emphasized its commitment and capacity to comprehensively address the cases before the ICC. It also further reiterated that investigations were already on-going in relation to three suspects before the Court. However, the Government voiced its disagreement with the notion of “same person- same conduct” test contending that the State may not have in its possession any evidence to provide to the Prosecutor of the ICC or it may even lack such evidence. But even in the event the State had in its possession the same evidence as that possessed by the Prosecutor, no requirement obligated the state to conduct an investigation that could lead to charging of accused persons in order to exclude the admissibility of the ICC.

In its decision, Pre-trial Chamber II established that the *Kenyan cases* were actually admissible under Article 17 (1) (a) of the Rome Statute, because Kenyan courts had failed to take any action on the cases. The judges observed that under the notion of complementarity the primacy of domestic proceedings was safeguarded. However, the Court held it had to balance the privilege of State to primacy of domestic proceedings with the goal of the Rome statute, which aims to end impunity. Therefore, although courts may have had the right to exercise their jurisdictional powers over persons alleged to have perpetrated crimes that fell within the jurisdiction of the ICC, their duty to discharge this mandate is also expressly delineated in paragraph 6 of the Preamble to the Rome Statute. The implication of such duty is that the ICC has the powers to intervene whenever States fail to discharge their mandate.

The Chamber, while appreciating Kenya’s will to undertake the investigation and prosecution of cases before the Court, noted that any admissibility challenges must be supported by presentation facts as well as legal parameters that apply to the matter in question. The challenge presented by Kenya was essentially, anchored on promises of judicial reforms with the aim of bolstering future investigative processes. However, the evidence adduced failed to

establish that prosecutions or investigations were ongoing with regard to the accused persons before the Court. Consequently, the Chamber concluded that the cases were admissible before the ICC in line with Article 17 (1) (a) of the Statute.

On 6 June 2011, the Kenyan government appealed Pre-Trial Chamber II's decision in line. The substance of the application was an allegation that Pre-Trial Chamber II had committed a legal error when interpreting the words: "the case is being investigated by a State which has jurisdiction over it" interpreted from article 17 (1) (a) of the Rome Statute. The effect of the alleged error on Pre-Trial Chamber II's finding was an interpretation that in order for a case to be considered inadmissible before the ICC, a national jurisdiction had to be involved in investigating the same individual for the same conduct object of the specific case already before the ICC (Ruto, Kosgey and Sang para 56). The Government of Kenya alleged that the test could be attributed to a decision derived from article 15 of the Rome Statute in regard to potential cases should be applied to all levels of proceedings, and not just at the situation level (Ruto, Kosgey and Sang para 57). It would be inaccurate to interpret the admissibility test as requiring that the same individuals be subjected to investigation by a national jurisdiction (*ibid*). On the other hand, if presumption is to be construed to favour national jurisdiction, then a "leeway" had to be created when exercising discretion to take in to consideration the principle of complementarity (Ruto, Kosgey and Sang para 57). The substance of allegation presented by the Kenya Government to the Appellate Chamber was supported by Ali (Muthaura, Kenyatta and Ali para 17), Ruto and Sang (Ruto, Kosgey and Sang para 31).

The prosecution, in response to that application, submitted that the issue of which test should be applied in the determination of admissibility had been addressed comprehensively by Pre-Trial Chamber II. The Prosecutor further contended that the test which had been established in the decision under article 15 of the Rome Statute was specifically created to determine admissibility issues limited to the situation stage" (Muthaura, Kenyatta and Ali para 63). In situations where concurrent exercise of jurisdiction by a State and the ICC existed, Article 17 clearly stipulates how the ICC should determine the appropriate forum to proceed. In this regard, the "same person-same conduct" test draws extensive support from texts and other drafts that form part of the history of the Rome Statute. The Government of Kenya had clearly failed to find any reversible error in the decision made by Pre-Trial Chamber II

(Muthaura, Kenyatta and Ali para 63). The Prosecutor's submissions were supported by the OPCV, which later submitted observations ((Muthaura, Kenyatta and Ali para 68).

The Appeals Chamber, in making its judgment, confirmed Pre-Trial Chamber II's decision affirming that the "same person" component that is integral to the admissibility test as well as the various instances in which admissibility assessment often take place were correctly decided by the Pre-Trial Chamber II.

The Appeals Chamber further clarified that, once summons to appear in Court or a warrant of arrest has been issued by the ICC, the determination of inadmissibility as articulated under Article 17 (1) (a) of the Rome Statute is premised on whether a case is the subject of investigation by both a national jurisdiction and the ICC (Rome Statute 12). The Higher Chamber further ruled that the purview of Article 17 extended to preliminary admissibility rulings advocated under Article 18 as well as in the determination of admissibility in concrete cases such as those stipulated under Article 19 of the Rome Statute. Moreover, Article 55 (2) of the Rules of Procedure and Evidence require the Pre-Trial Chamber to consider the factors outlined in article 17 of the Rome Statute as the basis for deciding whether to authorize an investigation. Article 53 (1) of the Rome Statute also clearly obligates the Prosecutor to consider Article 17 of the Statute before deciding whether to commence an investigation.

The Appeals Chamber concluded that the actual meaning of the term "case is being investigated" as outline under Article 17(1) (a) of the Rome Statute is best understood when examined in the context of its application. During the initial phase of an investigation, which is regulated by articles and 15 and 53(1), the contours of the potential case may be relatively obscure. The same applies for admissibility challenges articulated in Article 18 of the Rome Statute. Subsequently, individual suspects and their exact conduct as well as the legal classification of such conduct may not be clear at this stage of the proceedings (Muthaura, Kenyatta and Ali para 36-38).

Under articles 17 (1) (c) and 20 (3) of the Rome Statute, the ICC is barred from trying an individual tried by a domestic court with jurisdiction over the case unless the requirement of article 20 (3) (a) or (b) of the Rome Statute are met. Therefore, the accused person and the alleged conduct are the mandatory defining components of any concrete case that is brought before the ICC. Therefore, it is clear that in order for a case to be deemed inadmissible under Article 17 (1) of the Rome Statute, the domestic investigation must substantially involve the

same conduct and cover the same person as alleged in the ICC's proceedings (Muthaura, Kenyatta and Ali para 40). According to the Appeals Chamber, the appeal by the Kenyan Government was grounded on an admissibility challenge under Article 19(2) (b) of the Rome Statute, which was essentially concerned with a case in which specific suspects were issued with summons to appear in Court for a specific conduct. Therefore, the case in reference to Article 17 (1) (a) of the Rome Statute was essentially the case defined in the summons (Muthaura, Kenyatta and Ali para 42).

In February 2006, the ICC issued a sealed warrant of arrest for Thomas Lubanga Dyilo, who was alleged to be the founder and leader of the UPC, based in Ituri²³ (*The Prosecutor v Thomas Lubanga Dyilo* 23). At the time, Lubanga was already charged in the Congolese domestic justice system and was held in their custody. However, the ICC made a determination on the basis that the domestic justice systems did not have jurisdiction over the offenses committed and subsequently, transferred Lubanga to ICC custody. *Lubanga's case*, thus underscores a State's eagerness to bring to justice alleged perpetrators of offences even in instances where national justice systems may not have jurisdiction over the alleged offenses²⁴.

Another prominent demonstration of a states' conscientious effort to shield alleged perpetrators of atrocious crimes by instituting domestic investigations was witnessed *Prosecutor V. Charles Blé Goudé*, where the defendant, a notorious militia leader in Côte d'Ivoire who was associated with government of President Laurent Gbagbo, was indicted by the Court. On 30 September 2013, an arrest warrant against Charles Blé Goudé's was unsealed by the ICC which considered him a co-perpetrator in crimes against humanity in Côte d'Ivoire during the post-election violence in 2010-2011. However, Charles Blé Goudé's is still detained in Côte d'Ivoire where he is facing domestic charges for murder, war crimes,

²³ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, article 58, *supra* n. 191, para. 31.

²⁴ The Prosecutor's application was not solely founded on purported inability of the Democratic Republic of Congo to investigate or prosecute Thomas Lubanga. It is instructive to note that by the time the Prosecutor was making his application the "same-conduct test" was present in his submission to the chamber. See Sàcouto and K. Clearly, 'The Katanga Complementarity Decisions: Sound Law but Flawed Policy', (2010) 23 LJIL, 363-374, 365,

economic crimes and kidnapping perpetrated in Côte d'Ivoire during the post-election violence.

More recently, in the case of *Prosecutor v. Walter Osapiri Barasa*, the defense put up a spirited fight to defend the accused against extradition after Judge Cuno Tarfusser, issued a warrant of arrest against him. The ICC Prosecutor alleged that Barasa was criminally liable for intentionally committing as a direct perpetrator, or attempting to commit, the offence of “corruptly influencing a witness” contrary to the provisions of the Rome Statute.

However, in a filed defence request, the defence submitted that the Kenyan High Court was “due to hear submissions on the constitutionality of administrative procedures initiated by Kenya to enforce the warrant of arrest and on the substance of the competent Kenyan minister’s request for the issuance of a Kenyan arrest warrant”. Therefore, Barasa’s defence was hinged on the ongoing developments before Kenya’s judicial authorities²⁵ and that the OTP intended to lure him out of Kenya on the pretext that his safety and personal security was threatened and have him arrested in a third country. In *Barasa’s case*, although disguised as an attempt to challenge ICC’s jurisdiction and in essence evoke protection from the Kenyan justice system, it was nonetheless, premised on domestic proceedings. In rejecting the defence request, Judge Cuno Tarfusser, observed that the legality of the conduct of an organ of the court could not be determined by a domestic court.

2.3.2 The test of "Inability"

The court in the *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*²⁶ extensively discussed the notion of including inconsistency in the manner of conducting the proceedings, impartiality or independence, instituting criminal proceedings with sole purpose of shielding the suspect. Libya argued that it was carrying out concrete and specific investigative steps in relation to the case against the defendants and that its investigation is not in any way vitiated by 'unwillingness' or 'inability'.

²⁵ Barasa’s application implicitly alluded to admissibility challenge. In essence, the admissibility test has been mentioned by many authors, with many concurring with the position presented by Barasa. See among others Bacio Terracino, 'National Implementation of ICC Crimes. Impact on National Jurisdictions and the ICC', (2007); 'Prosecutorial Discretion v. Judicial Activism at the ICC', *supra* n. 200, 731;

²⁶ Case No. ICC- 01/11-01/11

The chamber observed that article 17(1)(a) of the Statute contemplates a two-step test, according to which it had, in considering whether a case is admissible before the Court, address in turn two questions: (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution; concluding that a case is inadmissible before the Court when both limbs of article 17(1)(a) of the Statute are satisfied.

The Court further observed that either of the two scenarios (unwillingness or inability) is sufficient to render a case admissible, and that, in practice, the same factual circumstances may often have a bearing on both aspects.

The Chamber then discussed at length several circumstances under which willingness and ability to carry out proceedings must be assessed: the relevant law and procedures applicable to domestic proceedings, related safeguards such as right of appeal and right to legal representation, resources, human and infrastructure capacity of the justice system, the constitutional framework and ratification of relevant human rights instruments.

While concluding that it was satisfied that the two cumulative requirements for a finding of unwillingness under article 17(2)(c) are not present in relation to the domestic proceedings against Al-Senussi, the Chamber held that the case against Al-Senussi was inadmissible before it because it was subject to domestic proceedings conducted by competent authorities and that Libya was willing and able genuinely to carry out such investigation.

However, despite its thorough examination of the question of unwillingness and inability, the Chamber's emphasis that alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute is particularly worrisome for it ignores the silent but critical element of genuinely which must be treated as a pre-condition of equal weight to willingness and inability.

4.4 Conclusion

Importantly, the Court has recognized that the two limbs of the admissibility test, while distinct, are intimately and inextricably linked. The admissibility test is based among others

the unwillingness and inability tests reinforces the primacy of national investigation and prosecution systems and as such, the Rome Statute is not a threat to state sovereignty.

CHAPTER 5

CONCLUSIONS

5.1 Introduction

Although complementarity was a masterstroke from the architects of ICC, ingrained within the Rome statute was the exclusion of immunities including for those who hold high political and military offices, even though they may still be in office. The development has profound ramifications in that no person is exempt from prosecution because of their current functions or position they held at time the crimes concerned were committed whether such position is that of head of state or government, minister or parliamentarian. This coupled with the fact that a person in authority may be culpable for crimes committed by those under their command meant the highest echelons of political and military powers were now threatened with prosecution for international crimes despite immunity from prosecution in domestic courts.

The quest for accountability for grave crimes is reshaping the entrenched orthodoxy of doctrine of state sovereignty and by extension, immunities under which pretext heinous and untold suffering was in some instances systematically meted out to groups of peoples.

This Chapter therefore provides the major conclusions drawn from the findings and discussions thereon from the study.

5.2 Conclusions

To the extent that granting national systems the primary role in investigating and prosecuting international crimes, complementarity is not an erosion of state sovereignty for the classic theory of sovereignty in its absolute form is indefensible in modern international law. Held (2002) ascribes to this view, noting that sovereignty can no longer be understood in terms of the categories of untrammelled effective power. Without the ingenuity of the principle of complementarity, it is highly unlikely that a sufficient number of states would have acceded to the Rome Statute for creation of the ICC.

Although the exclusion of any form of immunity may be argued to constrict the theory of sovereignty, the antithesis to this view is that the ICC is not under the jurisdiction of any other sovereign state hence prosecution before it is not necessarily an erosion of theory of sovereignty. This is further supported by the fact that no state has ever objected and challenged, on the basis of sovereignty, the jurisdiction of the UN Human Rights Committee to periodically examine their human rights record. Furthermore, as Nice (2014) argues, head of state immunity which was hitherto unchallengeable is now an antiquated theoretical concept rather than living adjunct to the management of international affairs. Overall therefore, the claim that the Court is an insidious ploy to wither state sovereignty does hold little merit if at all.

Due to the political nature of some aspect of crimes in the Rome Statute, the clash between the Court and the clamour for domestic instigations and prosecution is inevitable. It is for this reason that indictment by the Court has proved a volatile and combustible issue in some situations. The notion of unwillingness or inability genuinely to prosecute has therefore emerged as a critical test for the two sides contending either for national processes of proceedings before the Court.

The doctrine of state sovereignty, which at the highest level is manifested of political authority through presidential or head of state immunity and a myriad of other forms of immunities, is indirectly at the core of political elite's and some African countries' aversion towards the Court. Under the cloak of sovereignty concerted attempts have therefore been made to challenge the jurisdiction basing on the principle of complementarity on the one hand, and virulent political rhetoric against the Court on the other in an effort to undermine effort to bring to justice persons suspected to have committed crimes under the Rome Statute.

While not yet firmly anchored by practice and *opinio iuris*, there is emerging principle of customary international law that personal immunity cannot be a barrier to liability before international courts such as ICC for acts that considered breaches of the international criminal law. This is further strengthened on account that the lack of any form of immunity enshrined in article 17 of the Rome Statue is not alien to international law but similar provisions have already been upheld but courts and some stipulated in a number of conventions and international documents.

Although on the face of it there were inherent uncertainties and a huge flashpoint for contention, lack of definitions for "unwillingness" and "inability" has turned out to be a blessing in disguise, a progressive exclusion which has granted the Court greater flexibility to expand the scope of the two notions. Were it to be defined, there is likely that such would have ultimately proved restrictive and thereby curtailed the discretion of the Court to consider an array of unforeseeable circumstances. With the boundaries of unwillingness and inability tested, a challenge which remains is how to objectively determine the term "genuinely" and "intent" referred to in Article 17.

While it hasn't yet been subject of a judicial decision by the court, the existence of immunities in national legislations, more so absolute immunities for persons in authority and suspected to have masterminded commission of crimes under the Statute should constitute "inability" genuinely to prosecute as enshrined in article 17 for in such cases, the national courts are bound to apply the defence of immunity as prescribed in the national laws.

If the noble aspiration enshrined in the preamble to the Rome Statute that perpetrators of grave and unimaginable atrocities should now be held accountable unlike in the past there has been little effort if at all to bring such perpetrators to justice, the ICC, which is a stark reminder that impunity and disregard of international laws have no place in the modern era, must be given unflinching support and shielded from unwarranted criticisms premised on political considerations. It is in this regard that the Kenyan proposal to amend the Rome Statute to re-introduce immunity for certain categories of officials is regrettable and should be rejected by the state parties. For this proposal cannot stand the Lord Browne-Wilkinson's test by which there no immunity *ratione materiae* could exist for a crime contrary to international law nor could the maxim *par in parem non habet imperium* apply to such crimes.

Without engaging in the cyclic 'chicken-egg' which of the two comes first debate and whether it applies to the quest for peace and justice in context of violent conflicts, amnesties of any kind and immunities due to a suspects of international crimes under national jurisdiction should be construed as constituting unwillingness and inability genuinely to investigate and prosecute respectively. This appears to be supported by the statements of Uganda's Director of Public Prosecutions and the Head of the International Crimes Division of the High Court.

Whereas Justice Mike Chibita²⁷, Head of Uganda's Directorate of Public Prosecutions called for a reconsideration of amnesty given that the amnesty law in its current form is an impediment to successful prosecution of those most responsible and the fact that DRC, who has suffered considerably for LRA atrocities, is not party to the Uganda's amnesty law, Justice Moses Mukiibi was more forthright in his assessment of the impact of amnesty in stating that:

Customary international law entitles all States to prosecute perpetrators of other serious violations of the laws and customs of war and crimes against humanity... The fundamental purpose for the existence of the ICC, much like the ICD [of the High Court], is to try perpetrators of international crimes. ...Therefore, an Amnesty law which grants blanket pardon for all crimes committed in furtherance or cause [sic] of the war or armed rebellion undermines the existence of the ICD and the ICC Act, 2010....[and] in direct conflict with customary international law.

²⁷ Mike J. Chibita, speech at a seminar on “*Giving Full Effect to the Principle of Complementarity in Uganda And The Democratic Republic Of Congo*”, Held On 17th July 2014 at Parliament Conference Hall, Parliament Of Uganda

BIBLIOGRAPHY

Ambos K., Large J., Wierda M., (Eds.). *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*. Verlag Berlin Heidelberg, (Springer) 2009.

Annan, Kofi. *Justice for Kenya*. In: The New York Times. 9 September 2013.
http://www.nytimes.com/2013/09/09/opinion/justice-for-kenya.html?_r=0 [Visited 3 November 2014].

Anywar A. Jane. *The complex nature of the conflict, states cooperation & capacity to prosecute international crimes*. A Presentation at an International Seminar on “Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo”, Held on 17th July 2014, at Parliament Conference Hall, Parliament of Uganda

Arieff, A., Margesson, Rhoda, and Marjorie A. Browne. *ICC Cases in Africa: Status and Policy Issues*. New York (Diane Publishing) 2010.

Barbour, S. Rosaline and Schostak, John. 'Interviewing and Focus Groups', in Somekeh, Bridget and Lewin, Cathy (eds). *Research Methods in the Social Sciences*. London, (Sage Publications) 2005. pp 41 - 48.

Bassiouni, M. Cherif. *Introduction to International Criminal Law*. New York, (Martinus Nijhoff Publishers) 2012.

Berg, L. Bruce. *Qualitative Research Methods for Social Sciences*. 4th edn. Boston, (Allyn and Bacon) 2001.

Chibita J. Mike. Remarks at an International Seminar on “Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo”, Held on 17th July 2014, at Parliament Conference Hall, Parliament of Uganda

Cryer, Robert, Friman, Håkan, Robinson, Darryl and Wilmschurst Elizabeth. *An Introduction to International Criminal Law and Procedure*. 2nd edition. Cambridge, (Cambridge University Press) 2010.

Cryer, Robert. *Prosecuting International Crimes. Selectivity and the International Law Regime*, CUP, Cambridge 2005. Print.

D'Amato, Anthony. *International Law Anthology Book*. New York, (Anderson Publishing Company) 2012.

Daintith, Terence and Page, Alan. *The Executive in the Constitution: Structure, Autonomy, and ICC*. Rome Statute of the ICC. The Hague: (ICC) 2002.

Dawson, Catherine. *Introduction to Research Methods*. 4th edn. Oxford, (howtobooks) 2009.

Democratic Republic of the Congo v. Belgium. The International Court of Justice, The Hague, 14 February 2012.

European Union. *Advancing the Principle of Complementarity: Toolkit for bridging the gap between International and National Justice*. 2013.

Extraordinary Session of the Assembly of the African Union. *Decision on Africa's Relationship with the ICC (ICC)*. Addis Ababa. 12 October 2013.

Held, David. *Law of States, Law of Peoples: Three Models of Sovereignty*. In: Cambridge Journals. Vol.8 (2002), pp. 1-44. <https://www.law.upenn.edu/live/files/1509-heldlaw-of-states-law-of-peoplespdf> (Visited 21 October 2014)

Henzelin M, Heiskanen V and Mettraux G. *Reparations to Victims before the ICC: Lessons from international mass claims processes*. (2006) 17 Criminal Law Forum 317-344.

Hesse-Biber, N Sharlene. *Mixed Methods Research: Merging Theory with Practice*. New York, (The Guilford Press) 2010.

ICC. *The Evolution of International Criminal Law from Nuremberg to the Hague*. Briefing Paper at an ICC Seminar for Fostering Cooperation, 11-15 March 2013, Nuremberg, Germany

ICC. *Understanding the ICC*. 2011

ICC-OPT. *Policy Paper on the Interests of Justice*. http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/opt/ICC-OTP-InterestsOfJustice.pdf [visited 23 July 2014].

Jupp, Victor. *The Sage Dictionary of Social Research Methods*. London, (Sage Publications) 2006.

Kaul and C. Kre. *Jurisdiction and Cooperation in the Statute of the ICC: Principles and Compromises*. Yearbook of International Humanitarian Law (1999), p.143

Kleffner, J. K. *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra n. 10, 116.

Kothari, C.R. *Research Methodology: Methods & Techniques*. 2nd Revised Edition. New Delhi, (New Age International Publishers) 2004.

Kreß, Claus. *The Rome Statute and domestic legal orders*. New York: Con CD-ROM, Claus Kress. 2005.

Krings L. Britta. *The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?* Goettingen Journal of International Law Vol.4 (2012), pp.737-763

Kuenyehia, Akua, Anita Usacka and Sylvia Steiner. Situation in Darfur, Sudan. *In the Case of the Prosecutor V. Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*. The Hague: ICC, 2009. PDF file.

Markus Benzing. *The Complementarity Regime of the ICC: International Criminal Justice between State Sovereignty and the Fight against Impunity*. Max Planck Yearbook of the United Nations Law, Volume 7 (2003), pp.591-632

Mendes, Errol. *Peace and Justice at the ICC: A Court of Last Resort*. London, (Edward Elgar Publishing) 2010.

Merriam, C. E. *History of the Theory of Sovereignty since Rousseau*. Kitchener, (Batoche Books) 2001.

Mukiibi, Moses. *Complementarity in Practice in Uganda*. A Presentation at an International Seminar on "Giving Full Effect to the Principle of Complementarity in Uganda and the Democratic Republic of Congo", Held On 17th July 2014, at Parliament Conference Hall, Parliament of Uganda

Nesi, Giuseppe and Mauro Politi. *The Rome Statute of the ICC: A Challenge to Impunity*. New York, (Ashgate) 2001.

Newton, M. A. *Comparative Complementarity: Domestic Jurisdictions Consistent with the Rome Statute of the ICC*. Military Law Review, Vlo. 167 (2001), pp.20-73.

Nice, Geoffrey. *Head of State Immunity- a Useful Relic?* <http://www.gresham.ac.uk/lectures-and-events/head-of-state-immunity-%E2%80%93-a-useful-relic> [Visited 22 October 2014].

Nsereko D. D. Ntanda: *The Evolution of International Criminal Law and the ICC in Context*. Presentation during a Seminar on "International Criminal Justice, Challenges for domestic prosecutions and programmes for victims' access to justice and reparations" on 26, September, 2013 at the Conference Room, Parliament of Uganda.

Oluoch, Fred. *ICC asks Kenya to give details of amendments to Rome Statute*. In: The East African, 8-14 November 2014.

Pavlovic, Dusan. *Rousseau's Theory of Sovereignty* (2007). http://www.policy.hu/pavlovic/Bibliografija/MA_Rousseau_Sovereignty.pdf [22 October 2014].

Philippe, Xavier. *The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?* International Review of the Red Cross. Vol.88, No.862 (2006)

Prosecutor V. Charles Blé Goudé. Decision on Côte d'Ivoire's request to postpone the surrender of Charles Blé Goudé to the Court. ICC-02/11-02/11. 3 March 2014.

Prosecutor v. Germain Katanga. Summary Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of Prosecutor v. Germain Katanga. ICC-02/11-01/12. 7 March 2014.

Prosecutor V. Walter Osapiribarasa. "Decision on the "Defence request for disclosure(l)". ICC-01/09-01/13. 29 October 2013.

Punch, F. Keith. *Developing Effective Research Proposals Essential Resources for Social Research*. 1st edition. Thousand Oaks (Sage Publications) 2000.

Rehman, Javaid. *The Weaknesses in the International Protection of Minority Rights*. New York, (Martinus Nijhoff Publishers) 2000.

Reichel, L. Philip. *Comparative Criminal Justice Systems: A Topical Approach*. Upper Saddle River, (Prentice Hall) 2007.

Rome Statute of the ICC. Hague, (ICC) 2011.

Ryngaert, Cedric. *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*. Institute for International Law. Working Paper No.98. 2006

Sandelowski, Margarete and Barroso, Julie. *Handbook for Synthesizing Qualitative Research*. New York, (Springer Publishing Company) 2007.

Sthan, C. *Complementarity, Amnesties and Alternative forms of Justice: Some Interpretative Guidelines for the ICC* (2005) 3 JICJ, 695-720, 709.

The Prosecutor V .Thomas Lubanga Dyilo. No.: ICC-01/04-01/06

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case,

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 75.

The Prosecutor v Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a warrant of arrest, article 58, ICC-01/04-01/06-8-Corr, P.T.Ch.I, 10 February 2006, para. 30.

The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.

The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: ICC, 2012. PDF file.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC- 01/09-02/11-104, 6 June 2011.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Document in Support of the 'Appeal of the Government of Kenya against the “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”. ICC-01/09-02/11-130, 20 June 2011.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Prosecution's Response to the appeal of the Government of Kenya against the

decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, ICC-01/09- 02/11-168, 12 July 2011.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Defence response to the Government of Kenya’s “Document in Support of the Appeal against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11-166, 12 July 2011.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Victims Observations on the Government of Kenya’s Appeal Concerning Admissibility of Proceedings ICC-01/09-02/11-177, 19 July 2011.

The Prosecutor v. Simone Gbagbo. “Decision on Côte d’Ivoire’s request to provide additional documents in support of its challenge to the admissibility of the case against Simone Gbagbo.” ICC-02/11-01/12, 20 February 2014.

The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Ruto and Sang Defence Response to the Government of Kenya’s “Document in Support of the Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09- 01/11-185, 12 July 2011.

The Prosecutor vs. Saif Al-Islam Gaddafi and Abdullah Al-Senussi. No.: ICC-01/11-01/11 <http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf> [Visited 24 February 2014]

The Prosecutor vs. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.: ICC, 2012. Pdf file.

The Republic of Kenya, The International Crimes Act, 2008 http://www.issafrica.org/anicy/uploads/Kenya_International_Crimes_Act_2008.pdf [visited 13 November 2014]

The Republic of Uganda, The International Crimes Act, 2010.

UN General Assembly. *Rome Statute of the ICC* <http://www.refworld.org/docid/3ae6b3a84.html> [Visited 14 January 2014]

Walliman, Nicholas. *Research Methods: The Basics*. London, (Routledge) 2011.